Local 917, International Brotherhood of Teamsters *and* Peerless Importers, Inc. Case 29–CE–128

May 11, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On March 30, 2005, Administrative Law Judge Raymond P. Green issued a decision in this case dismissing the complaint. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief. On September 30, 2005, the Board issued a Decision and Order reinstating the complaint and remanding the proceeding to the judge to issue a supplemental decision.[1]

On March 15, 2006, the judge issued the attached decision on remand. The General Counsel filed exceptions, the Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision on remand and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] only to the extent consistent with this Supplemental Decision and Order.

In his decision on remand, the judge dismissed the complaint, which alleged that Teamsters Local 917 (the Respondent) violated Section 8(e) by grieving Peerless Importers Inc.'s (Peerless) failure to assign unit employees certain work, by arbitrating that grievance, and by securing an arbitration award holding that the parties' collective-bargaining agreement prohibited Peerless from failing to assign the work to unit employees under the circumstances in this case. We reverse and find that the Respondent violated Section 8(e).

I. FACTS

Peerless, the Charging Party, is an employer engaged in the distribution of alcoholic beverages throughout the New York City Metropolitan area. The Respondent represents a unit of Peerless' drivers and helpers. Five clauses in the parties' collective-bargaining agreement require Peerless to use unit employees to transport beverages to and from its facility, with exceptions not relevant here.[4]

Peerless purchases beverages from several suppliers, including Diageo North America Inc. (Diageo). Before October 1, 2002, Peerless was one of two New York distributors of Diageo's beverages. On that date, Peerless and Diageo entered into a Distribution Agreement, making Peerless the exclusive Diageo distributor in the New York City Metropolitan area.

When negotiating the 2002 distribution agreement, representatives of Diageo and Peerless did not discuss which of the parties would transport the beverages from Diageo to Peerless. Moreover, the Distribution Agreement does not expressly address this issue. However, the distribution agreement does give Diageo authority to unilaterally change "Sales Terms," except for "remittance" terms:

> Prices and the terms and conditions of sale ("Sales Terms") shall be in accordance with Diageo's then in effect Sales Terms as may be modified from time to time by Diageo without the consent of [Peerless], provided, that, Diageo will not make any material change in its remittance terms (except with respect to credit as provided below) without the consent of [Peerless] . . . .[5]

For many years, Peerless' unit employees transported Diageo's beverages from Diageo's facilities to Peerless' facility.[6] Unit employees continued to transport Diageo's beverages during the first 6 months under the Distribution Agreement (from October 2002 to April 2003). In March 2003, Diageo informed Peerless that it was instituting a nationwide program called "Delivered Pricing." Diageo's representatives explained the program's details in a PowerPoint presentation. Under the program, Diageo would transport certain brands to Peerless and charge Peerless for delivery in the purchase price of those brands.

[1] *Teamsters Local 917 (Peerless Importers)*, 345 NLRB No. 73 (2005) (finding that the judge had abused his discretion by dismissing the complaint sua sponte to sanction Peerless for failing to comply with a subpoena).

[2] The Charging Party has effectively excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] No party excepted to the judge's finding that Sec. 10(b) does not bar the Board from finding that the Respondent violated Sec. 8(e).

[4] The clauses are set forth in the attached supplemental decision.

[5] Peerless's president, Antonio Magliocco, testified that "Sales Terms" include how the beverages are transported. This testimony is unrebutted.

[6] Some of Peerless' other suppliers transported their beverages to Peerless. Peerless' unit employees transported all of Diageo's beverages until April 2003.

In April 2003, Diageo implemented its delivered pricing program and began using its employees to transport some of its brands to Peerless. Unit employees no longer transported these brands to Peerless.[7]

The Respondent filed a grievance in November 2003 alleging that Peerless breached the collective-bargaining agreement by failing to use unit employees to transport all of Diageo's beverages. In the ensuing arbitration, Peerless defended on the ground that it lacked the right to control the disputed work and that the Respondent was violating Section 8(e) by attempting to apply the collective-bargaining agreement to work that Peerless no longer controlled. On September 28, 2004, an arbitrator issued an award finding that Peerless breached the collective-bargaining agreement by "permitting merchandise from Diageo North America to be delivered to the Company's [i.e., Peerless'] warehouse by non-bargaining unit personnel." The arbitrator delayed issuing a remedy and instead permitted Peerless to file an unfair labor practice charge:

> If the Company does not file an unfair labor practice charge with the NLRB within 60 days of the date of this Award, or if the NLRB does not issue a complaint after such a charge is filed, the Arbitrator will hold a hearing at the request of either party to determine the appropriate remedy.

Peerless filed an unfair labor practice charge on October 6, 2004. On December 30, 2004, the General Counsel issued a complaint.

II. JUDGE'S DECISION ON REMAND

The judge dismissed the complaint. He reasoned that a party does not violate Section 8(e) by enforcing an agreement to preserve work traditionally performed by unit employees. He found that unit employees had traditionally transported beverages from Diageo to Peerless, except when no unit employees were available on a particular day. The judge rejected Peerless' arguments that it did not have the right to control the disputed work. Rather, the judge recommended dismissing the complaint because he determined that there was insufficient evidence in the record to conclude whether Diageo or Peerless made the decision that Diageo would deliver certain brands to Peerless.

III. ANALYSIS

Section 8(e) makes it unlawful for a union and an employer to "enter into" an agreement expressly or implicitly requiring the employer "to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person."[8] Notwithstanding Section 8(e)'s broad wording, the Supreme Court has held that Section 8(e) does not prohibit all agreements that require an employer to cease doing business with another employer. The Supreme Court and the Board have long interpreted Section 8(e) to permit "primary" agreements and to prohibit only "secondary" agreements.[9] A valid work-preservation agreement is a lawful primary agreement. *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 644–645 (1967).

The Supreme Court has established the following analysis for determining whether an agreement is a lawful work-preservation agreement:

> Whether an agreement is a lawful work preservation agreement depends on "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [bargaining unit] employees, or whether the [agreement was] tactically calculated to satisfy union objectives elsewhere . . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees." *National Woodwork*, supra, 386 U.S. at 644–645 []. Under this approach, a lawful work preservation agreement *must pass two tests*: First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called 'right of control' test of [*NLRB v. Pipefitters Local 638*, 429 U.S. 507 (1977)]. The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work. "Were the latter the case, [the contracting employer] would be a neutral bystander, and the agreement or boycott would, within the

[7] Peerless's director of operations, Salvatore Geneva, testified that he was present at the PowerPoint presentation. Geneva testified that he never objected to Diageo taking over the transportation, and that, to the best of his knowledge, nobody from Peerless objected. Geneva also testified that Peerless's unit employees continue to transport some of Diageo's brands. This testimony is unrebutted.

[8] See *Air Line Pilots Assn.*, 345 NLRB No. 51, slip op. at 3 (2005) (union violated Sec. 8(b)(4)(ii)(B) by filing a grievance and a counterclaim with an object of forcing an employer to enter into and comply with an agreement prohibited by Sec. 8(e)).

[9] *NLRB v. ILA*, 447 U.S. 490, 504 (1980) ("Although § 8(e) does not in terms distinguish between primary and secondary activity, we have held that, as in § 8(b)(4)(B), Congress intended to reach only agreements with secondary objectives."); *NLRB v. ILA [II]*, 473 U.S. 61, 78–79 (1985).

intent of Congress, become secondary." *National Woodwork*, supra, at 644–645.

NLRB v. Longshoremen ILA, 447 U.S. 490, 504–505 (1980) (emphasis added); see also *NLRB v. Longshoremen ILA [II]*, 473 U.S. 61, 74–76 (1985); *National Woodwork Mfrs. Assn. v. NLRB,* 386 U.S. 612, 644–645 (1967). The inquiry is often an inferential and fact-based one, at times requiring the drawing of lines "more nice than obvious." *NLRB v. Longshoremen ILA,* 447 U.S. at 81 (citing *Electrical Workers v. NLRB*, 366 U.S. 667, 674 (1961)); *National Woodwork Mfrs. v. NLRB*, 386 U.S. at 645.

Further, the right-to-control test is not mechanical or wooden. *Local 438 United Pipe Fitters (George Koch Sons, Inc.*), 201 NLRB 59, 64 (1973), enfd. 490 F.2d 323 (4th Cir. 1973). The Board will look at "not only the situation the pressured employer finds himself in but also how he came to be in that situation." Id.; see also *Electrical Workers Local 501 (Atlas Construction Co.)*, 216 NLRB 417, 417 (1975), enfd. 566 F.2d 348 (D.C. Cir. 1977). If the employer is not truly an "unoffending employer," the Board will find no violation in a union's attempt to enforce an agreement to retain disputed work. An employer may not be considered "unoffending," and therefore neutral, if it "actively and knowingly contracted away its control by *initiating* the very restrictions which ultimately gave rise to the union's demands . . . or if the coerced employer was, in fact, given control of the work at issue but, *of its own volition*, withheld the work from the union." *Atlas Construction*, 216 NLRB at 417 (emphasis in original). In the absence of affirmative action by the employer, however, the employer would be an unoffending neutral. Id.

It is clear that the agreement between Peerless and the Union, as interpreted and applied by the arbitrator, impairs the business relationship between Peerless and Diageo. That is, the agreement, as interpreted by the arbitrator, prohibits Peerless from doing business with Diageo as long as Diageo insists upon delivering the product to Peerless.[10] Concededly, the unit employees have historically performed that work. However, as discussed above, the "work preservation" defense has a second prong. If the employer of the unit employees has lost control of the work, and such loss of control was not initiated by it or at its own volition, the work preservation defense is not a valid one. *NLRB v. Pipefitters Local 638*, supra, 429 U.S. at 525–526. See also *Atlas Construction*, supra 216 NLRB at 417 (right of control doctrine "presumes an employer to be 'neutral' if that employer, when faced with a coercive demand from its union, is powerless to accede to such a demand except by bringing some form of pressure on an independent third party.") We conclude that, under this test, Peerless did not have the right of control.[11]

As detailed above, the distribution agreement by its terms gives Diageo the authority to unilaterally change "Sales Terms." The Distribution Agreement defines "Sales Terms" as "Prices and the terms and conditions of sale." The "terms and conditions" of the sale normally include the means by which the product will be delivered. Consistent with the usual understanding of the term, Peerless's president, Antonio Magliocco, testified that the phrase "Sales Terms" includes whether Diageo or Peerless would deliver the freight.[12] Accordingly, we find that Diageo's contractual authority included the right to insist that it deliver the beverages to Peerless as a condition of sale and Peerless, by agreeing to those terms, lost the right to control the disputed work.

In April 2003, Diageo exercised its right of control by assigning to its own employees the work of delivering some of its products to Peerless. There is no evidence that Peerless initiated this change, which was announced by Diageo in March 2003. The most that can be said is that Peerless did not actively resist it. However, given the contractual authority possessed by Diageo, it does not appear that Peerless had a legal leg on which to stand.

[10] Our dissenting colleague views this conclusion as speculative, and cites *Mfrs. Woodworking Assn. of Greater New York, Inc.,* 345 NLRB No. 36 (2005) and *Heartland Industrial Partners,* 348 NLRB No. 72 (2006) in support of her view. *Mfrs. Woodworking* is distinguishable. There, the issue was whether a multiemployer bargaining group violated Sec. 8(a)(1) by filing a demand for arbitration to cause the union to require employees to engage in an unlawful secondary boycott. The Board disagreed, The possibility that an arbitrator might issue an award that could result in a secondary boycott, and that the union could thereafter coercively compel employees to participate in such a work stoppage, was deemed too speculative to establish a violation of Sec. 8(a)(1) based on the demand for arbitration alone. Here, no such speculation is required. An arbitrator has issued an award against Peerless, and that award makes clear that the parties' collective-bargaining agreement does not allow Peerless to permit Diageo to deliver its products to Peerless. In addition, an 8(e) violation does not require a showing of coercion.

Member Schaumber also finds *Heartland* distinguishable. In *Heartland,* the issue was whether the disputed clause, on its face, violated Sec. 8(e). Unlike this case, Member Schaumber notes that there was no allegation in *Heartland* that the clause had been applied in an unlawful manner. Chairman Battista dissented in *Heartland* and would have found the 8(e) violation.

[11] No party has excepted to the judge's statement that the General Counsel had the burden of proving that Peerless did not have the right of control over the disputed work. We conclude that a violation of Sec. 8(e) has been made out regardless of which party has the burden of proof on this issue.

[12] Diageo's decision to deliver some of its products to Peerless also affects their price, because Diageo charges a higher price for products it delivers.

Conceivably, Peerless could have refused to do business with Diageo under the Diageo dictate, but that could have involved a breach of contract suit, and, in any event, would have resulted in a loss of the unit work. See *NLRB v. Pipefitters Local 638*, supra, 429 U.S. at 514 (union unlawfully pressured neutral employer with an object of either forcing primary to change its manner of doing business or forcing neutral to cease doing business with it).

This analysis leads to the last issue, that is whether Peerless can be said to be an "unoffending employer" who merits the Act's protections. *Plumbers Local 438 (George Koch Sons, Inc.)*, 201 NLRB 59, 64 (1973), enfd. sub nom. *George Koch Sons, Inc. v. NLRB*, 490 F2d 323 (4th Cir. 1973) (cited with approval in *NLRB v. Pipefitters Local 638*, supra, 429 U.S. at 523 fn. 11). A coerced employer may forfeit neutral status if, by contracting away its right of control, it affirmatively engages in conduct "which the employer could reasonably conclude would conflict with his collective-bargaining obligations, coupled with the absence of any demand for such conduct by an independent third party." *Atlas Construction*, supra, 216 NLRB at 417 (emphasis in original). In applying this test, the employer's actions at the time it negotiates away the right of control are a circumstance to be considered, but are not alone determinative. Instead, the Board also will consider whether, at the time of a union's demand for disputed work, the employer was powerless to assign it. Id. at 418.

Here, Peerless is not an offending employer. While the agreement negotiated in 2002 gave Diageo the authority to unilaterally change "Sales Terms," there is no evidence that the parties contemplated that this provision would result in the reassignment of delivery work. Indeed, the unit employees continued to perform the work for 6 months after the agreement. Under these circumstances, we cannot say that Peerless "could reasonably conclude" that its acceptance of this agreement conflicted with its obligation under its collective-bargaining agreement to assign delivery work to unit employees. *Atlas Construction*, supra.

Further, even if Peerless understood that Diageo might one day take over the delivery function, that does not mean that Peerless was an offending employer. There is nothing to suggest that Peerless was the initiator of the agreement which gave *Diageo* that power. It defies logic and common sense to say that Peerless was the initiator of a clause which gave *Diageo* certain rights. Finally, it was clearly Diageo, not Peerless, which made the decision at issue, viz. the decision to take over the delivery function. Thus, at the time the Respondent demanded the work in April 2003, by its effort to enforce the collective-bargaining agreement, Peerless, like the employer in *Atlas Construction*, supra, was "powerless to assign" it to unit employees. Accordingly, it was an "unoffending employer" at all times material to this case.

Contrary to the dissent's assertion, we have not mechanically applied the Board's right-to-control test. We have found that, under the distribution agreement, Peerless lacked a right to control the disputed work, a point which our dissenting colleague assumes for argument's sake. We have also carefully examined how Peerless found itself in a position where it lacked a right to control. Under all the circumstances, we find that Peerless did not engage in affirmative conduct that could render it an "offending" employer. Accordingly, the Respondent could not lawfully pursue and secure an interpretation of the collective-bargaining agreement that would forbid Peerless from assigning work that Peerless did not control.

Our dissenting colleague argues that a union will not likely be privy to the details of an employer's conduct in contracting away its right of control. She further posits that, in these circumstances, a union might not be able to determine in advance whether it is committing an unfair labor practice by pursuing contractual arbitration. The distinction between lawful primary and unlawful secondary activity, however, frequently turns on the terms of contractual arrangements between the primary employer and an asserted neutral, regardless of whether the union is privy to those terms. See, e.g., *Oil Workers Local I-591 (Burlington Northern Railroad)*, 325 NLRB 324, 329 fn. 26 (1998). Moreover, an employer has a statutory duty to provide requested information that allows a union to decide whether to process a grievance. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). In the instant case, the Union did not even seek such information. It simply proceeded against Peerless without regard to who had control..

Our analysis is not inconsistent with the Board's decision in *Milk Wagon Drivers Local 603 (Drive-Thru Dairy, Inc.)*, 145 NLRB 445 (1963), a readily distinguishable case relied on by the dissent. In that case, Pevely Dairy had a contract with the union that forbade customer pickup of product at Pevely's dock if such pickups resulted in a loss of work or reduction in hours for drivers represented by the union. Nonetheless, Pevely agreed that Drive-Thru, a customer, could purchase dairy products from Pevely at its dock, and transport the products to Drive-Thru's store using nonunit employees.[13] That agreement, by its terms, was "in

[13] Pevely had not allowed dockside sales to other customers, and the disputed work had consistently been performed by unit employees. On these facts, the Board found that the union engaged in lawful primary activity when it refused to allow Drive-Thru to make the deliveries.

derogation of" Pevely's lawful work preservation agreement with the union. Indeed, a loss of unit work was inevitable once Pevely entered into it. By contrast, the distribution agreement gave Diageo the right to assign the disputed work in this case. A loss of unit work was neither inevitable nor foreseeable at that time, but was instead the result of decisions made by Diageo 6 months later. Had Diageo decided not to implement delivered pricing, Peerless employees would have continued performing the delivery work and there would have been no violation of the work preservation agreement.[14]

Similarly, *United Dairy Workers Local 83 (Sealtest Foods Division)*, 146 NLRB 716 (1964) is distinguishable. In that case, Sealtest made "the first move" by permitting customers to pick up products at the Sealtest dock. Supra at 722. By contrast, in the instant case, Peerless' customer, Diageo, made the decision to implement delivered pricing.

Nor does Pipe Fitters Local 120 (*Mechanical Contractors' Assn. of Cleveland, Inc.)*, 168 NLRB 991 (1967), warrant a different result. In that case, Wrightco had a contract with the union under which employees were to perform fabrication work on piping two inches or less at the jobsite. Wrightco, however, entered into a contract with Trane which specified that such piping would be factory installed. The Board concluded that the union's object in threatening not to connect such units was to preserve contractual work, and thus its conduct did not violate the Act. Again, it is plain here that Peerless did not specifically and expressly contract away any delivery rights in its agreement with Diageo, and thus we cannot find that the loss of work was of Peerless' own doing.

In sum, the Respondent's enforcement of the requirement that Peerless use unit employees to transport beverages to and from its facility impairs its business relationship with Diageo and, as shown above, Peerless was an unoffending neutral without the right to control the disputed work. Thus, the Respondent violated Section 8(e) by seeking to enforce the relevant provisions of its collective-bargaining agreement under these circumstances.

ORDER

The National Labor Relations Board orders that the Respondent, Local 917, International Brotherhood of Teamsters, Floral Park, New York, its officers, agents, and representatives, shall

1. Cease and desist from seeking to enforce or apply, through grievance or arbitration, any collective-bargaining agreement with Peerless Importers Inc., a person engaged in commerce or in an industry affecting commerce, where an object thereof is to cease doing business with Diageo North America Inc.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw the grievance filed in November 2003 and the subsequent demand for arbitration.

(b) Reimburse Peerless Importers Inc. for all reasonable expenses and legal fees, with interest, incurred in defending against the grievance and arbitration demand.

(c) Within 14 days after service by the Region, post at its business office and meeting hall copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[14] Our colleague criticizes our distinction of *Drive-Thru Dairy* and *Mechanical Contractors' Assn. of Cleveland*. However, our discussion of those cases is clearly grounded on the accepted principle that if a company is an "unoffending employer" as defined in our jurisprudence, it is a neutral, and a union's attempt to enforce an agreement would therefore violate Sec. 8(e). In each of those cases, the employer was not truly an "unoffending employer," since the loss of control of the work involved was by its own volition. That is not the situation here.

Our colleague also asserts that the employer's culpability does not resolve the issue of the union's objective, and that from a union's perspective, the only issue that matters is that the work has been lost. That position is at odds with the well-established "unoffending employer" doctrine. Indeed, the Supreme Court has rejected as "untenable under the Act" the view that a union's efforts to enforce a lawful work preservation clause must necessarily be viewed as primary and not an unfair labor practice. *NLRB v. Pipefitters Local 638*, supra, 429 U.S. at 515–517.

Member Schaumber further notes that *Drive-Thru Dairy* was decided in 1963, well before the seminal Supreme Court cases delineating the scope of the Act's secondary boycott provisions. See *NLRB v. ILA*, supra, 447 U.S. 490, 504 (1980); *NLRB v. ILA [II]*, 473 U.S. 61 (1985); *NLRB v. Pipefitters Local 638*, 429 U.S. 507 (1977); *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967). The same is true of *Sealtest Foods*, also cited by the dissent. These cases also predate the Board's decision in *George Koch Sons, Inc.*, supra, wherein the Board outlined both the right of control and unoffending employer doctrines. Neither case analyzes the union conduct at issue therein in light of those tests. In these circumstances, he would give greater weight to the later Board decisions for the purpose of resolving the issue presented in this case.

Chairman Battista relies solely on the fact that *Drive-Thru Dairy* and *Sealtest* are distinguishable from the instant case.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Furnish the Regional Director for Region 29 signed copies of such notice for posting by Peerless Importers Inc., if willing, at its premises.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 11, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

As the Supreme Court has explained, the "touchstone" of Section 8(e) of the National Labor Relations Act is whether a union's challenged agreement is "addressed to the labor relations of the contracting employer vis-à-vis his own employees" and thus is primary, not secondary, in nature.[1] "Although broadly worded, Section 8(e) was not intended to prohibit a labor organization from executing or enforcing . . . an agreement when its objective is to preserve for its members bargaining unit work or to reacquire work previously performed. . . ."[2] That is precisely what the respondent union did here, in successfully pursuing a contractual grievance when the employer failed to use bargaining-unit employees to perform work that, by contract, they had traditionally performed. The majority's finding of a violation is based on a mechanical application of the Board's "right-to-control" test, focusing on whether the employer has the power to give employees the work in question. This approach is contrary to both Board and Supreme Court precedent, which require that all the circumstances here be carefully analyzed.

I.

The Charging Party, Peerless Importers, Inc., distributes wine and spirits in the New York City area. The Respondent, Local 917, International Brotherhood of Teamsters, represents drivers who have, for many years, transported goods to Peerless's warehouse. Peerless and Local 917 have a contract that requires Peerless use bargaining-unit employees to handle such shipments.

Peerless purchases beverages from several distributors, including Diageo North America Inc. On October 1, 2002, Peerless and Diageo entered into a distribution agreement making Peerless the exclusive distributor for Diageo's goods in the New York City area. From October 2002 until April 2003, the Local 917-represented employees continued to handle Diageo's shipments as they had before.

In April 2003, Diageo implemented a new pricing system called "Delivered Pricing." Under that program, Diageo would ship certain of its brands to Peerless, and then charge Peerless for the price of delivery. Although this meant Local 917 employees would no longer handle those brands, no one from Peerless objected to the program.

In November 2003, Local 917 filed a grievance alleging that Peerless was violating the parties' collective-bargaining agreement by allowing Diageo to deliver goods. In September 2004, an arbitrator found that the "plain language of the Agreement gives the Union jurisdiction over the work of picking up merchandise." He delayed his remedy pending the resolution of this case.

II.

Local 917's pursuit of its contractual grievance against Peerless had no discernible object other than the preservation of work that Peerless admits has historically been performed by bargaining-unit employees. Indeed, for the Union to recapture that work, Peerless and Diageo must continue to do business, not "cease doing business," in the words of Section 8(e).[3] Of course, union activity does not become secondary simply because it results in some disruption of business relationships. See, e.g., *Interna-*

[1] *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 645 (1967). In pertinent part, Section 8(e) states:

> It shall be an unfair labor practice for any labor organization and any employer to enter any contract or agreement, express, or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of an other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter contain such an agreement shall be to such extent unenforceable and void.

[2] *Newspaper & Mail Deliverers (Hudson News)*, 298 NLRB 564, 566 (1990) (fn. omitted), citing *National Woodwork Mfrs. Assn.*, supra, and *NLRB v. International Longshoremen's Assn.*, 447 U.S. 490 (1980).

[3] It is wholly speculative at this point to say, as the majority does, that the arbitrator's potential remedy for the contractual breach would necessarily have required Peerless to end its relationship with Diageo. Cf. *Heartland Industrial Partners,* 348 NLRB No. 72, slip op. at 4 (2006) (General Counsel did not show that agreement authorized arbitrator to order employer to cease doing business with second employer); *Mfrs. Woodworking Assn. of Greater New York, Inc.*, 345 NLRB No. 36, slip op. at 4 (2005) (General Counsel did not show that compliance with potential arbitration award would require union to violate Sec. 7 rights of represented employees).

tional Longshoremen's Assn., 473 U.S. 61, 78 fn. 18 (1985).[4]

The majority acknowledges that the agreement here thus meets the first test of a lawful work preservation agreement, as articulated by the Supreme Court: it "ha[s] as its objective the preservation of work traditionally performed by employees represented by the union."[5] But the majority concludes that the agreement does not satisfy the second, "right to control" test: that the "contracting employer must have the power to give the employees the work in question."[6] In the majority's view, Peerless, as a consequence of its distribution agreement with Diageo, lacked that power, and thus Local 917's effort to enforce its collective-bargaining agreement with Peerless necessarily had a secondary objective, influencing Diageo. But a proper application of controlling law demonstrates that the Local used lawful means—indeed, federal labor policy's preferred means for settling labor disputes—toward a lawful end.[7]

A.

The Supreme Court, echoing the Board, has explained that the "right to control" test is not determinative, nor may it be applied without considering all of the relevant circumstances. See *NLRB v. Enterprise Assoc.*, 429 U.S. 507, 524 (1977) (*Pipefitters*).

In the *Pipefitters* case, the Court quoted with approval the Board's statement that:

> [T]he Board has always proceeded with an analysis of (1) whether under all the surrounding circumstances the union's objective was work preservation and then (2) whether the pressures exerted were directed at the right person, i.e., at the primary in the dispute....
>
> In following this approach, however, *our analysis has not nor will it ever be a mechanical one*, and, in addition to determining under all the surrounding circumstances, whether the union's objective is truly work preservation, we have studied and shall continue to study *not only the situation the pressured employer finds himself in but also how he came to be in that situation.*
>
> And if we find that the employer is not truly an "unoffending employer" who merits the Act's protections, we shall find no violation in a union's pressures ... even though a purely mechanical or surface look at the case might present an appearance of a parallel situation.

Id. at footnote. 11 (emphasis added; paragraph divisions altered), quoting *Local 438 United Pipe Fitters (George Koch Sons, Inc.)*, 201 NLRB 59, 64 (1973).[8]

Here, a careful look at how Peerless came to be in the situation that precipitated this case demonstrates that Peerless was not an "unoffending employer" and that Local 917's objective was "truly work preservation." There is no dispute that Local 917 drivers delivered goods from Diageo to Peerless, not only before Peerless and Diageo entered into an exclusive-distribution agreement, but even for 6 months afterward. Only when Diageo later implemented the "Delivered Pricing" program (which the majority concludes Diageo had the contractual right to do)[9] did Peerless stop assigning the work to Local 917 drivers. Although Local 917 drivers historically had handled Diageo's shipments, Antonio Magliocco, president of Peerless, admitted that during the six-week negotiation of the distribution agreement, there was no discussion of who would be moving freight. Thus, Diageo did not insist, as a condition of continuing to do business with Peerless, that Diageo employees make deliveries formerly handled by Local 917-represented employees. Magliocco also testified that the procedure that Peerless and Diageo have for resolving disputes was not invoked in connection with Diageo's setting the terms of sale or its moving of its own shipments.

In short, Peerless contracted away its right to control that work. That makes all the difference. In *Pipefitters Local No. 120 (Mechanical Contractors' Assn. of Cleveland, Inc.*), 168 NLRB 991, 992 (1967), the Board held that an employer cannot "contract away the performance of its work and then claim the status of a neutral."[10]

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[4] In contrast, the Board has long held that contract clauses that seek to acquire for bargaining unit employees work that has traditionally been performed by employees of *other* employers "are considered as having an unlawful secondary effect." *Teamsters (California Dump Truck Owners)*, 227 NLRB 269 (1976).

[5] International Longshoremen's Assn., supra, 447 U.S. at 504.

[6] Id.

[7] See generally *United Paperworkers Intl. Union v. Misco*, *Inc.*, 484 U.S. 29, 37 (1987) (discussing federal labor policy in favor of grievance-arbitration and citing Sec. 203(d) of National Labor Relations Act).

[8] Accord: *NLRB v. International Longshoremen's Assn.*, supra, 473 U.S. at 81 ("The various linguistic formulae and evidentiary mechanisms we have employed to describe the primary/secondary distinction are not talismanic nor can they substitute for analysis").

[9] No court or arbitrator has been called on to interpret the Peerless-Diageo agreement. I assume for the sake of argument that the majority is correct in concluding that Diageo had a contractual right to handle the delivery work.

[10] See also *Painters District Council 20 (Uni-Coat Spray Painting)*, 185 NLRB 930, 932 (1970) (refusing to apply right-of-control test where employer contracted away control, "knowingly setting stage for potential conflict" between work-related agreements and collective-bargaining agreement).

B.

The majority properly acknowledges that the right-of-control test "is not mechanical or wooden," but nonetheless applies the test just that way in following the Board's decision in *IBEW, Local 501 (Atlas Construction Co.)*, 216 NLRB 417 (1975), enfd. 566 F.2d 348 (D.C. Cir. 1977). There, the Board described prior decisions as holding that

> an employer could not be considered "unoffending" and therefore neutral, if it actively and knowingly contracted away its control by *initiating* the very restrictions which ultimately gave rise to the union's demands . . . or if the coerced employer was, in fact, given control of the work at issue but, of *its own volition*, withheld the work from the union. . . . [T]he coerced employer's forfeiture of neutral status was based on some *affirmative* conduct which the employer could reasonably conclude would conflict with his collective-bargaining obligations, coupled with the *absence* of any demand for such conduct by an independent third party such as a general contractor or project owner.

216 NLRB at 417 (emphasis in original).

Here, the majority observes that there is no evidence that Peerless initiated Diageo's implementation of the Delivered Pricing program, which deprived Peerless of the right to control the work at issue.[11] "The most that can be said," the majority notes, "is that Peerless did not actively resist it." And while Peerless, by agreeing to the Distribution Agreement, gave Diageo the contractual authority to later implement the Delivered Pricing program, "there is no evidence that the parties contemplated at the time that th[e] provision [in the Distribution Agreement] would result in the reassignment of delivery work." Thus, in the majority's view, there is no basis to find that Peerless 'could reasonably conclude' [in the words of Atlas Construction] that its acceptance of the [Distribution Agreement] would conflict with its obligation under its collective bargaining agreement to assign delivery work to unit employees."

The majority errs in relying on *Atlas Construction*, a case with only superficial similarities to this one.[12] *Atlas Construction* revolved around the operation of the temporary power supply on a construction project. That work was never offered by the general contractor *(Atlas)* to the two neutral employers, subcontractors—and thus the work had never been performed by subcontractor employees represented by the respondent unions. The Board rejected the approach of an administrative law judge, who had found no violation based on his view that the two subcontractors "simply did not try hard enough to secure the operation of the temporary power supply from Atlas at the negotiation stage of the subcontracts." 216 NLRB at 418. That approach, the Board explained, was "realistically futile, as well as administratively unmanageable"—although the Board also pointed out that "[w]hat a subcontractor does at this stage is a circumstance to be considered." Id.

Here, of course, Peerless employees represented by Local 917 were performing the work in question, at the time that Peerless voluntarily entered into the Distribution Agreement with Diageo, and continued to perform that work afterwards, until Diageo implemented the Delivered Pricing Program—with no objection at all from Peerless.[13] That is surely a "circumstance to be considered" in the words of *Atlas Construction*. Contrary to the majority, there is no inherent inconsistency between the collective-bargaining agreement and the distribution agreement, preventing Peerless from reaching an agreement with Diageo that would have been consistent with the agreement between Peerless and Local 917. Indeed, pursuant to the work-preservation clauses of the collective-bargaining agreement, Local 917-represented employees handled all of Diageo's shipments for 6 months after the distribution agreement was reached and continue to handle some of Diageo's freight.

In comparable circumstances, the Board has refused to find a violation of Section 8(e). See *Milk Wagon Drivers, Local 603 (Drive-Thru Diary, Inc.)*, 145 NLRB 445 (1963). There, the employer (Pevely) sold dairy products to retail outlets, including Drive-Thru. Pevely and Drive-Thru entered into an agreement providing that "Pevely would sell . . . products to Drive-Thru at 'dockside' cost based upon Drive-Thru's willingness to pick up its purchases at Pevely's dock." Id. at 447. The union representing Pevely's drivers objected, relying on its collective-bargaining agreement with Pevely, which pro-

[11] In fact, the record is similarly bereft of any evidence that Peerless did *not* initiate its loss of control. As the judge found, "[n]either the General Counsel nor the Charging Party produced any witnesses to establish when, how or who made the decision to shift the work of delivering the goods from the employees of Peerless to the employees of Diageo."

[12] In light of *Pipefitters* and *George Koch* (which emphasized the need to analyze every case on its own facts), the discussion of prior decisions in *Atlas Construction* does not mean that the "right to control" test would be satisfied *only* in the circumstances recognized previously.

[13] The majority, as indicated, insists that Peerless could not reasonably have known that entering into the Distribution Agreement would ultimately strip Peerless of the right to control the work. But that assertion is contradicted by the majority's own view that the Distribution Agreement unquestionably gave *Diageo* the right to control the work (when it ultimately chose to exercise that right). If the implication of the Distribution Agreement is so clear to the majority, one wonders, then why was it not clear to Peerless?

hibited customers who normally received their product via delivery from picking up products at Pevely's dock. The union instructed members not to load Drive-Thru's truck. The Board found no unfair labor practice, concluding that "Pevely's agreement to sell to Drive-Thru at dockside was in derogation of its contract" with the union and that the union's strike was intended to "protect the work of Pevely's drivers." Id. at 448.[14]

The majority argues that *Drive-Thru Dairy* is distinguishable because in that case "a loss of unit work was inevitable" once the two employers entered into their agreement, while here "a loss of unit work was neither inevitable nor foreseeable" when the distribution agreement between Peerless and Diageo was concluded.[15] But what mattered in *Drive-Thru Diary* was that the employers' agreement was "in derogation" of the collective-bargaining agreement, just as the distribution agreement was here. While it may not have been inevitable that Diageo would choose to exercise its right under the agreement, it was foreseeable, given the majority's finding that the agreement clearly gave Diageo the right of control over delivery of its products. Diageo would not have bargained for a contractual right that it never foresaw exercising.

The majority attempts to distinguish *Mechanical Contractors' Association of Cleveland*, supra, on what amounts to the same unsatisfactory basis, observing that here "Peerless did not specifically and expressly contract away any delivery rights in its agreement with Diageo."

Considering the aims of Section 8(e) of the Act, it is not clear what statutory purpose is served by requiring that an employer must "specifically and expressly" contract away the right of control, before a union may lawfully pursue a work-preservation grievance. As the Supreme Court has explained,

> The rationale of the [right-to-control] test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work.

International Longshoremen's Assn., supra, 447 U.S. at 504–505. The majority's restatement of the right-to-control test is not grounded in this rationale. The demonstrable culpability of an employer who acts with the specific intent to evade a collective-bargaining agreement does not resolve the issue of the *union*'s objective. From the union's standpoint, what matters is simply that employees have lost work that they traditionally have performed, as guaranteed by the collective-bargaining agreement. The union will not likely be privy to the details of the employer's conduct with respect to the contracting away of its right to control, but these facts are dispositive under the majority's test.[16]

III.

Here, "under all the surrounding circumstances the union's objective was work preservation" and "the pressures exerted were directed at the right person, i.e., at the primary in the dispute."[17] Local 917-represented employees had a clear contractual claim to the work at issue, which they had historically performed. The Local asserted that claim through lawful, contractual channels against the contracting party, Peerless (not Diageo), and it prevailed. The majority's holding, then, means not only that Local 917 has no legal means to rectify Peerless's breach of contract, but that the Local may be sanctioned under the National Labor Relations Act for even pursuing the matter. In short, Peerless's agreement with Diageo trumps Peerless's prior agreement with the Local. That result has no firm support in federal labor law. Accordingly, I dissent.

Dated, Washington, D.C. May 11, 2007

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

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[14] For a case involving similar facts, and a similar result, see *United Dairy Workers, Local No. 83 (Sealtest Foods Division)*, 146 NLRB 716 (1964).

[15] Member Schaumber argues that *Drive-Thru Dairy* (decided in 1963) and *Sealtest Foods* (1964) are entitled to little weight because they predate the Board's decision in *George Koch Sons, Inc.,* supra, and the "seminal Supreme Court cases delineating the scope of the Act's secondary boycott provisions."

I disagree with my colleague's understanding of the law's development in this area. *Drive-Thru Dairy* and *Sealtest*—which have never been overruled or questioned—are perfectly consistent with the right-of-control test as it has come to be applied: not mechanically, but with consideration of the particular factual circumstances of a case. The two cases were decided in an era when the Board sometimes distinguished between primary and secondary activity "simply in terms of a right-of-control test." *George Koch Sons*, supra, 201 NLRB at 64. *George Koch Sons*, of course, disavowed that approach. It seems fair to say, then, that *Drive-Thru Dairy* and *Sealtest* represent the counter-trend to the decisions addressed in *George Koch Sons* and thus that the two cases anticipated later developments.

[16] Indeed, under the majority's test, a union cannot be certain, in advance, whether it will be committing an unfair labor practice simply by pursuing contractual arbitration. That situation seems legally untenable.

[17] *Pipefitters*, supra, 429 U.S. at 524, quoting *George Koch Sons,* supra, 201 NLRB at 64.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT seek to enforce or apply, through grievance or arbitration, any collective agreement with Peerless Importers Inc., a person engaged in commerce or in an industry affecting commerce, where an object thereof is to cease doing business with Diageo North America Inc.

WE WILL withdraw the grievance filed in November 2003 and the subsequent demand for arbitration.

WE WILL reimburse Peerless Importers Inc. for all reasonable expenses and legal fees, with interest, incurred in defending against the grievance and arbitration demand.

LOCAL 917, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Rachel Zweighaft, Esq., counsel for the General Counsel.
Gene M. J. Szuflita, Esq., counsel for the Union.
Allen B. Roberts, Esq. and *Donald B. Krueger, Esq.,* counsel for the Charging Party.

SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. This case was remanded to me and the hearing was held on January 11, 2006.[1]

The charge was filed by Peerless Importers Inc. on October 6, 2004 and the complaint was issued on December 30, 2004. In substance, the complaint alleged:

1. That Peerless, located at 16 Bridgewater Street, Brooklyn, New York is engaged in the distribution of alcoholic beverages.
2. That Diageo North America Inc., located at 450 Park Ave. South, New York, New York, is engaged in the wholesale distribution of alcoholic beverages.
3. That on or about May 17, 2004, Peerless and the Union entered into an agreement retroactive to November 11, 2002 that states:

> 3.27. Scope of Agreement. The handling of all railroad shipments, whether it be piggy back, tractor-trailer, flexi-van, or any other type of railroad conveyance, and those of freight consolidators and car loading companies, and freight brought via water or water borne, fish-back or birdy-back, originating elsewhere and terminating anywhere within Kings County, New York County, Bronx, Queens, Nassau and Suffolk Counties, bounded roughly by a line starting on the North Shore of Poet Jefferson and running southward through Coram in the middle and on down to Patchogue on the South Shore, and in Staten Island and within a radius of fifty miles into the State of New Jersey, must be done by employees covered by this Agreement.
>
> 3.28. The unloading, loading and transportation of merchandise at freight depots, domestic and foreign, has been and continues to be unit work within the scope of this Agreement. All freight consigned to wine and whisky wholesalers, distributors, distillers, rectifiers or other processors or receivers of same, under contract to the Union, shall be handled and hauled from anywhere within the areas mentioned above to the Employer's receiving and shipping premises in accordance with the following stipulations and conditions, provided, however, if the Employer, at its option, assigns at least two employees as regular platform workers, the employer shall not be required to employee drivers and helpers for each outside vehicle.
>
> 3.29. Merchandise shipped from anywhere within the Continental United States or its Possessions, including Puerto Rico, whether by steamship, steamship container, or steamship van, piggyback, fishy-back, birdy-back, railroad car or van, shall come to rest somewhere with the areas mentioned above, there to be handled and transported to the wholesaler by employees covered by this Agreement.
>
> 3.30. The Employer shall transport all such merchandise arriving in above named conveyances with its own equipment and with a chauffeur and helper from the seniority list assigned to each truck. The chauffeur must remain with the load he or she has picked up until it is fully unloaded.
>
> 3.31. Merchandise in foreign commerce from other countries or commonwealths, arriving at ports in the United States or arriving at foreign ports and subsequently shipped here, whether loaded in vans, containers, tanks or other conveyances and all consignments of wines and liquors, or part thereof, when arriving or conveyed in barrels, casks, hogshead, pipes, tanks, or other type bulk liquor

[1] I initially dismissed the complaint because the Charging Party refused to turn over certain documents, in unredacted form, that the Union had subpoenaed and which I determined were necessary to its defense. However, the Board disagreed with what it considered to be a drastic solution to an issue that could have been resolved by less drastic means. At the resumed hearing, I stated that my order requiring the production of the unredacted documents still stood. The Charging Party, instead of complying, turned over a redacted version of the documents to the Union.

carrier, whether originating domestically or imported, shall be unloaded and/or transported wholly in the state of its arrival, by chauffeurs and helpers covered under the Agreement. Pier and piggyback may exceed six hundred

4. That starting in or about April 2003, Diageo began making deliveries of alcoholic beverages directly to the Employer's Brooklyn facility.[2]

5. That in or about November 2003, the Respondent attempted to apply the provisions of the agreement to the deliveries made by Diageo by filing a grievance alleging that Peerless was violating the agreement by allowing Diageo to make deliveries of alcoholic beverages directly to the Brooklyn facility.

6. That on or about June 28, 2003, the Union took the aforesaid grievance to arbitration thereby entering into and reaffirming the agreement described above. This agreement, as applied, is alleged to violate Section 8(e) of the Act.

Based on the entire record, including my observations of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The complaint alleges, the Answer admits and I find that the Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Answer also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

Diageo, a company located in Stanford Connecticut is involved in the importation of alcoholic beverages to the United States.[3] It is a subsidiary of Diageo PLC, which is based in London. Among the well known brands that it sells are Smirnoff vodka, Bailey's Irish Cream, Johnny Walker, and Tanqueray.

Peerless is a wholesale distributor of wines and spirits. It is located in Greenpoint Brooklyn and it distributes these products in the Metropolitan New York area. Its customers include retail wine and liquor stores, plus restaurants and hotels. It employs about 750 persons.

Peerless purchases wines and liquors from various suppliers including Diageo. In October 2002, it entered into an exclusive arrangement with Diageo to distribute the latter's products in the New York area. Previously, Peerless was one of two New York wholesalers who purchased Diageo's products.

For many years, the Union has represented the drivers and helpers employed by Peerless. Pursuant to the contract between the Union and Peerless, those employees have been assigned by Peerless to move freight not only from Peerless to its customers, but also from piers, railroad yards, and storage facilities to Peerless' warehouse in Greenpoint. This has been a longstanding practice, consistent with the express language of the contract provisions quoted above. Except in those circumstances where Peerless did not have sufficient drivers available and the Union therefore agreed to a particular waiver, the employees of Peerless have been exclusively assigned to bring goods from its suppliers' receiving locations to Peerless' warehouse. This was also the case when Peerless did business with Diageo before they entered into the exclusive agreement in 2002.

As noted above, Peerless and Diageo entered into a contract in October 2002 wherein Peerless was chosen, over a bid by another wholesaler, to be the exclusive wholesaler of Diageo's products in New York. This agreement is more than 40 pages long and appears, (at least to me), to be quite complex. Presumably it took some time and expertise to negotiate. It appears that pursuant to this agreement Diageo can, at least theoretically, unilaterally establish the prices of the beverages it sells to Peerless. On the other hand, if it deems the price for any particular product to be too high, Peerless can reduce or eliminate its purchases of those particular beverages. For example, if Diageo set the price of Sterling Sauvignon Blanc at a level that Peerless thinks will not sell well in New York, it could opt to not buy that brand and buy another brand of similar wine from another supplier. One can assume, given a market economy free from governmental price controls, that the power of Peerless to substitute another supplier for a competing product must impose some limitation on Diageo's theoretical power to set prices. [4]

The negotiation of this agreement was described in very general terms by Antonio Magliocco, Peerless' President. Significantly, he testified that during the negotiations there was no discussion about who was to be responsible for delivering the products from Diageo's receiving locations to Peerless' warehouse. Presumably as Peerless and Diageo had done quite a lot of business with each in the past, they were or should have been aware of the existing practice that Peerless and its employee-drivers would be the people who would be delivering the goods from the pier or rail yard to Peerless' warehouse. It would be hard to imagine that these astute business people did not factor into the contract price, the cost of delivering the products from Diageo to Peerless.

After the Peerless/Diageo contract was executed, the bargaining unit employees of Peerless continued their longstanding practice of delivering the products from Diageo to the Peerless warehouse. At that time, there is no question but that Peerless had the right to control the assignment of delivery driving work.

In or about March 2003, Diageo announced a program called "Delivered Pricing." It is claimed that under this program, someone in Diageo made the decision to have goods moved from its receiving point to Peerless' warehouse by Diageo's drivers rather than the bargaining unit drivers employed by Peerless.

[2] At the opening of the hearing, the General Counsel amended this allegation to change the date from October 2003 to April 2003.

[3] It also purchases wines from both domestic and foreign producers.

[4] When setting prices, Diageo is required by New York State to post, on a monthly basis, the price of each of the items sold. (As a wholesaler, Peerless is also required to post its prices). This is not a matter of the State regulating the price of these goods, but rather to afford the public some transparency and to assure that no unfair discounts are given to some customers over others.

However, neither the General Counsel nor the Charging Party produced any witnesses to describe which individuals made this decision. Nor were there any witnesses produced, (either from Diageo or Peerless), to tell me why this decision was made, when the decision was made, or what the economic ramifications to the parties were. I do not know who participated in the making of the decision and I do not know who, if anyone, participated in any negotiations or discussions between Diageo and Peerless before the decision was made and implemented.

In any event, the Union, not having been notified of this change, and discovering that the driving work, traditionally performed by Peerless bargaining unit employees was now being done by others, it filed a grievance under the cited sections of its collective bargaining agreement.

On June 28, 2004, a hearing was held before arbitrator Richard Adelman. During that hearing, Peerless contended that the decision to have the deliveries made by Diageo's drivers was not within Peerless' control and/or that the provisions that the Union were seeking to enforce were violative of Section 8(e) of the National Labor Relations Act. Adelman issued an award in favor of the Union on September 28, 2004. As to the 8(e) argument, the arbitrator noted that the Company had not filed an 8(e) charge with the NLRB and that although he would have no hesitancy in ruling on that question if the Board had deferred its own proceedings to arbitration that was not the case here. He also stated:

> Moreover, assuming that the Company's reading of the law regarding the meaning of the "right of control" test is correct, the Company, by not submitting its agreement with Diageo into evidence, failed to establish that Diageo had control over the work at issue. In addition, as stated above, the Company was aware of the terms of the agreement with the Union at the time it contracted with Diageo, yet the Company did not notify the Union of the arrangement it was making with Diageo. In short, although the Arbitrator finds that the Company violated the Agreement, it is not clear whether or not the Company had the requisite control over the work, or whether or not other factors should be considered in determining if Section 8(e) has been violated, decisions that should be made by the NLRB.

III. ANALYSIS

The General Counsel asserted that she is not claiming that the clauses, taken separately or together, violated Section 8(e) of the Act on their face. That is, she concedes that the clauses could be interpreted, in the appropriate circumstances, as having a valid work preservation object. Her contention is that in the present circumstances, the Union asked the arbitrator to enforce the clause in an unlawful way because the work claimed, (certain truck driving), was work "not within the control" of Peerless and therefore was not work that could be "preserved."

In typical cases involving Section 8(e), the gravaman of the complaint is that a union and a company employing individuals represented by the union, have entered into an agreement whereby the company has agreed not to do business with any other person with whom the union has a primary dispute. In those circumstances, if such an agreement, either on its face *or* in its specific application, is used to prevent an employer or person with whom the union has no primary dispute to cease doing business with another employer with whom the union does have a primary dispute, then the agreement is deemed to have a secondary objective and constitutes a violation of Section 8(e) of the Act. In such circumstances, the employer having the collective bargaining agreement with the Union is described as being an "unoffending neutral."

As the agreement between the Union and Peerless was made more than 6 months prior to the filing of the charge, the General Counsel must show that it was reaffirmed, (otherwise defined as reentered), within the 10(b) statute of limitations period. Board cases have held that the General Counsel can meet this test by showing that the signatory union has filed a grievance and taken a case to arbitration to enforce the contractual provisions, not for a work preservation objective, but to compel the contracting employer to cease doing business with another employer or person. *Elevator Constructors (Long Elevator*), 289 NLRB 1095, (1988).[5]

Faced with an 8(e) claim, a union often will argue that the attacked clause does not have a secondary objective and that it merely is designed to preserve the work of the bargaining unit employees covered by the collective bargaining agreement within which the alleged offending clauses reside. In this case, the Union contends that it has a contract with Peerless that covers the wages, hours and working conditions of truck drivers who are employed by Peerless. It contends, and that facts clearly show that for many years, Peerless truck drivers have uniformly had the assignment of picking up beverages from Diageo's receiving locations and delivering them to Peerless' warehouse in Greenpoint Brooklyn. The only exception to this practice has been when all of the Peerless drivers are otherwise busy and Peerless has no drivers available on any particular day to do the work. Therefore, the Union asserts that (a) this type of delivery work is clearly traditional bargaining unit work; (b) that the Union is merely seeking to preserve that work for the employees it represents; and (c) that it therefore has a "primary" dispute with Peerless and not with Diageo. In seeking to enforce its contract with Peerless, the Union contends that it merely is trying to enforce the bargain it made with Peerless to preserve bargaining unit work.

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[5] I should note here that the Board in this case also held that an 8(e) finding based on the filing for arbitration would not be inconsistent with the holding of *Bill Johnson's Restaurant*. The Board stated:

> Because we have concluded that the contract clause as construed by the Respondent would violate Section 8(e), we may properly find the pursuit of the grievance coercive, notwithstanding the Supreme Court's decision in *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983). Although holding that the Board could not enjoin, as an unfair labor practice, the lawsuit at issue in that case, the Court expressly noted that it was not dealing with a "suit that has an objective that is illegal under federal law." 461 U.S. at 737 fn 5. See also *Teamsters Local 705 v. NLRB (Emery Air Freight*), 820 F.2d 448 (D.C. Cir. 1987) (distinguishing between having an unlawful motive in bringing a lawsuit and seeking to enforce an unlawful contract provision).

The General Counsel and the Charging Party respond by arguing that although the clauses in question may very well have a preservation of work objective, its enforcement *in this particular case* had a secondary objective because in this case Diageo made the decision to have the deliveries reassigned from Peerless' drivers to its own drivers. They therefore argue that when this happened in 2003, Peerless no longer had the "right to control" regarding the assignment of this work. Arguing that Peerless, having lost the right of control, they contend that the enforcement of the clauses cannot have a primary work preservation objective because Peerless no longer had the work to be preserved. That is, even if Peerless wanted to, it could not assign the work to its own drivers. The leading case dealing with the distinction between lawful work preservation clauses versus unlawful secondary hot cargo clauses is *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967). See also, *Elevator Constructors Local 91 (Otis Elevator Co.)*, 345 NLRB No. 68, (2005).

Since the clauses in question are legal on their face and concededly can have the primary objective of preserving bargaining unit work, the Union's attempt to enforce them by arbitration must be deemed legal unless the General Counsel and the Charging Party meet their burden of proof that Peerless did not have the "right of control."

In my opinion, the General Counsel and the Charging Party have failed to meet that burden.

Neither the General Counsel nor the Charging Party produced any witnesses to establish when, how or who made the decision to shift the work of delivering the goods from the employees of Peerless to the employees of Diageo. Essentially, they would have me accept a conclusory assertion, without any supporting witnesses, that Diageo made this decision and did so for some unknown reason. I simply do not know how or why this decision was made or by whom.

On the face of it, and absent any other explanation, the economic beneficiary of the change was Peerless and not Diageo. Obviously, if Diageo assumed the cost of delivering the products to the Peerless warehouse, then Peerless would reduce its costs without having to change a word or term of its contract with Diageo. For all I know, this decision was made after Peerless complained that its costs were too high and instead of changing the contract terms with Diageo, the latter offered to lighten Peerless' load by assuming the labor cost of having the goods delivered to Peerless' warehouse. If that was the case, (and there is no evidence to show that it was not), then Peerless would have been the real beneficiary of this change and could not be considered an "unoffending neutral." *Painters District Council No. 20 (Uni-Coat Spray Painting Inc.*), 185 NLRB 930 (1970).

It is my opinion that with respect to the "right of control" issue, where the evidence resides within the exclusive knowledge of Peerless and Diageo, the General Counsel has the burden of proof. As union representatives did not participate in, or witness any transactions between Peerless and Diageo, they could not have any knowledge of those facts. Since it is my opinion that the General Counsel has not met her burden of proof on this issue, I conclude that the Union legally enforced its contract to preserve bargaining unit work for the employees it represents.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., March 15, 2006.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.